CORRESPONDENCE/MEMORANDUM **DEPARTMENT OF JUSTICE**

Date: November 27, 2002

To: Kris Randal
Department of Commerce / Legal

From: Steve Wickland
Department of Justice

Subject: Mews v. Department of Commerce, Case No. 01 CV 2153

Kris, we received a favorable decision in the Mews case. Judge Lee Dreyfus, Jr. affirms the Department of Commerce decision to deny the additional PECFA reimbursement amount of $62,791.63 sought by petitioner. The court, in its November 22 decision and order, holds that 1) the Department's standard for determination of contiguous contaminated area (and, therefore, a finding of a single occurrence here) is consistent with the statutory definition of "occurrence;" 2) that the Department's single-occurrence standard is (in effect) a rule, but that its non-publication as a rule did not result in detrimental reliance by petitioner; and 3) that the interdepartmental meeting is required, but (as its purpose is interdepartmental coordination and DNR and Commerce did coordinate) not holding it did not affect petitioner. A copy is attached for your file. It was good working with you on this case.

Attachment

STATE OF WISCONSIN: WAUKESHA COUNTY: CIRCUIT COURT:

JAMES MEWS, and MEWS COMPANIES, INC,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF COMMERCE,

Respondent,

CASE NO.: 01CV2153

DECISION AND ORDER

This matter is before this court on a certiorari review of the Department of Commerce (DOC) decision regarding reimbursement for soil and ground water contamination on property that the Petitioner owned. Pursuant to the Petroleum Environment Clean-up Fund Act (PECFA) the Petitioner is entitled to reimbursement for his clean up costs. The DOC determined that this was a "single occurrence" and therefore the maximum amount of reimbursement of the clean up costs was $500,000. The Petitioner actually expended more than $500,000 for clean up costs for the site and as a result of the determination of DOC the Petitioner was denied reimbursement for $62,791.63. It is that denial that is been brought before this Court on the Writ of Certiorari. For the reasons as will be set forth in this decision I am denying the Petitioners Writ of Certiorari and sustaining the determination made by DOC, and the Administrative Law Judge.

FACTUAL BACKGROUND

Petitioner owned a concrete business. In 1984 there were installed on the premises a three thousand gallon underground waste oil tank and two, ten thousand gallon underground diesel tanks. The waste tank was for exactly that, the storage of waste oil, whereas the diesel

tanks were for the storage of diesel fuel used by the trucks in the Petitioners business. The waste tank was located on the premises approximately one hundred forty feet from the two diesel tanks. As the claims came in, the DOC treated the waste oil tank and the diesel tanks as being "separate" sites. Final determination, however, is not made until all of the requests for reimbursement occur. Under PECFA an owner can be reimbursed up to $500,000 for one occurrence and up to $1,000,000 for two occurrences. In April 1993 all three of the underground tanks were removed because they were leaking and contaminating the surrounding area. Petitioner, as part of the remediation of the contaminated soil, removed and replaced the soil until it came within the standards as promulgated by the Department of Natural Resources (DNR). Monitoring wells were installed and in 1994 the Petitioner requested site closure from the DNR. The DNR however would not close the site as groundwater showed high levels benzo(a)pyrene and naphthalene. Because of this ground water contamination, the DNR required additional work at the site in order to find out the extent of the ground water contamination as well as the contaminant source. Additional field studies were done that included soil borings as well as installing four ground water monitoring wells. In 1996 the DNR asked the Petitioner to remediate the remaining ground water contamination on the site. This was going to be effectuated by installing two ground water recovery wells. Ground water would be pumped from these two wells, treated on the site by a carbon absorption system, and then the clean water would be discharged into the Menomonee River. This system ran for a year and further testing in 1997 confirmed that the ground water contamination had been remediated and there was no further cleaning of the ground water needed. In 1997 the pumping of the ground water concluded and ultimately the site was closed in 1999.

During this process the Petitioner did attempt to get clarification as to whether this would or would not be deemed two occurrences for reimbursement. On September 30, 1994 the Petitioner requested an interdepartmental meeting between himself, the DOC and the DNR pursuant to Sec 101.143(2m). This meeting is required under statute, however, the meeting was never held.

By letter dated February 9, 1995, DNR Hydrogeologist John Feeney informed the Petitioner, among other things, that the contamination plumes on the Petitioners property may have co-mingled, and that this could effect the amount of his PECFA deductible. Further, in April 1996 the DOC issued a decision stating that the plumes had intermingled and "therefore the claims were combined as one and a single $7500 deductible was assessed". As a result of the additional costs associated with the ground water remediation, the costs exceeded the $500,000 reimbursable amount through PECFA for a single occurrence. Because this ended up being deemed a single occurrence the Petitioner owed the DOC a balance of $62,791.43. If this was deemed to be two occurrences, these additional costs would be covered through PECFA. It is from this determination of the Administrative Law Judge that the Petitioner brings this certiorari review.

DECISION

In certiorari actions the reviewing court must decide if the agency: (1), kept within it's jurisdiction; (2), acted according to law; (3), the action was arbitrary, oppressive or unreasonable; and (4), the evidence presented was such that the agency might reasonable make the decision that it did. State ex rel Jones v Franklin 151 Wis 2d 419, 444 N.W. 2d 738 (Ct.App.1989). For a decision to be in accordance with the law it must be determined to be in accordance with the

concepts of due process and fair play and cannot be an arbitrary action. Ball v McPhee 6 Wis 2d 190, 94 N.W. 2d 711 (1959). Further the court must decide if there is substantial evidence to support the agency's decision. State ex rel Palleon v Musolf, 120 Wis 2d 545 356 N.W. 2d 487(1984). However, when facts are not in dispute, the application of law to those facts is an issue of independent review by this court. Sterlingworth Condo Assoc. Inc v Department of Natural Resources, 205 Wis 2d 710, 556 N.W. 2d 791(Ct.App.1983) Further, questions of law are to be reviewed de novo by the reviewing court, without deference to the agencies decision. Merkel v Village of Germantown 218 Wis 2d 572 (1998). In de novo circumstances the reviewing court is not bound by the Administrative Agencies interpretation of a statute. Karrow v Milwaukee County Civil Service Commission 82 Wis 565 (1978).

Section 227.57(5) states "The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of the law." However, Sec. 227.57(10) recognizes that upon such review due weight shall be recorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.

In these types of reviews the court must also determine weather there is substantial evidence to support the agencies determination that the Petitioner should not be reimbursed the additional expenses for his clean up effort. If there are conflicting views in a case each supported by substantial evidence the agencies view of the evidence is the view that should be accepted. Robertson Transportation Company v Public Service Commission, 39 Wis 2d 653, 159 N.W. 2d

636 (1968).

Part of the Petitioner's confusion with regard to the amount that he was entitled to for reimbursement of clean up costs, resulted from different standards used by the DOC and the DNR with regard to these matters. An occurrence is defined as "a contiguous contaminated area resulting from one or more petroleum products discharges." Section 101.143(1)(cs). Pursuant to the DOC, for two occurrences to exist, there must be "clean soil" between the two sites, proving that they are not contiguous and instead are separate contaminated areas. The Petitioner contends that the standard to be utilized should be the DNR standard for clean soil. This does not require that the soil be "pristine". An area can still contain contaminants however not require further clean up as long as it is below contaminate levels as established by the DNR. The DOC however does not utilize the DNR's clean soil standards for the purposes of determining occurrences. The DOC argued, and the administrative law judge agreed, that the fact that the soil contaminant level is below DNR clean up levels, does not negate the evidence supporting the finding of one area of contamination. Even if the contamination was below the DNR clean up level, chemicals still were found between the waste oil tank and diesel tanks creating the presumption that the sites had co-mingled. The petitioner did not rebut this presumption.

The Petitioner complains that the standard, requiring no contamination between the sites, is a rule. It is not published and therefore it is illegal. According to the testimony of Nancy Kochis all of the test wells showed evidence of similar contaminants. The Petitioner did not do any kind of study that showed whether off site contamination played a role in the test results nor any other scientific testing to determine if the fill that had been used at the site actually leached into the ground water. The Petitioner could have looked at both the soil and the ground water

contamination data and compared that against what may have been background contaminants that were determined to be in the fill material. This could have been used to help to define the PECFA eligibility, however, the Petitioner didn't do that. As indicated the Petitioner complained about the standards but did nothing to show that the contamination that still existed, especially in the ground water, was a result of the fill itself and not because of the leakage from both the waste oil and the diesel tanks.

The DOC's interpretation of clean soil is certainly consistant with the language that defines occurrence in Sec 101.153(1)(cs). There was certainly evidence that there was a contiguous contaminated area even if it did not require further clean up or remediation pursuant to DNR standards. There is nothing in the statute that makes an exception for a certain level of cleanliness. Under this circumstance I am satisfied that the DOC's interpretation is in fact reasonable.

I do agree with the Petitioners contention that the standard utilized by the DOC, and again if you refer back to the testimony of Nancy Kochis, she indicated that this standard is used on a daily basis, should have been promulgated by the DOC as a rule pursuant to Sec. 227.10(1). The position of the Petitioner is that by not publishing this rule there was no notice to individual such as the Petitioner, and therefore the DOC should be estoped from enforcing this soil cleanliness standard. Though I am satisifed that it is a rule and is administered as if it were a rule, and therefore it should have been published by the DOC, I don't see that it's non publication in any way resulted in detrimental reliance by the Petitioner. The issue here is not just the soil contamination which appears to be the primary focus of the Petitioner. We also had ground water continamation that was not fully remediated until 1997. Again the clear testimony

of Nancy Kochis with regard to this issue was that even if the only contimination was the ground water it would still constitute a single occurrence for PECFA reimbursement.

The Petitioner contends that if he had known earlier that this was a single occurrence he may have withheld doing the remediation of the ground water until the DNR stepped in and actually required that he do so. I find this arguement to at best be disingenuous. The Petitioner had a clear obligation to remediate the site that included not only the soil conditions but also the ground water as it clearly was shown to be contaminated. The remediation in order to be eligible for PECFA reimbursement must be done in the least expensive methodology to achieve the results. Individuals can not just expend any amount they want and expect reimbursement, it must be financially appropriate under the circumstances. The Petitioner further could not close this site until the soil and the ground water met DNR standards and that did not occur until 1997.

One of the other issues for the Petitioner is that the Petitioner had sold part of this property. Proceeds from this sale were being held in escrow until he resolved the clean up issues with the DNR and the DOC. Clearly the Petitioner needed to have the site remediated and to have the clean up be approved by the DNR and DOC. This would allow for closure of the site in order to complete the sale and to receive all of the funds from sale of this property that he was otherwise entitled to. So again for the Petitioner to say, he could simply wait until he was forced to remediate by the DNR, I am satisfied this does not fit the factual circumstances both in terms of the Petitioners obligation as well as the Petitioner having already sold a portion of the property and desiring to receive all the money from the sale.

The Petitioner claimed that because there was not the interdepartmental meeting held between himself, the DOC and the DNR pursuant to Sec 101.143(2m) he didn't receive the

necessary clarification as to whether this would or would not have been a single occurrence. I'm satisified, however, that this position is without merit. The purpose of the meeting purusant to Sec 101.143(2m) is as the title states for "interdepartmental coordination". It's purpose is not to explain what may be the rules or what maybe the statutory requirements under PECFA. Though the meeting is required, under statute there is no penalty provision for the meeting not being held. This would also be consistant with the purpose of the meeting, that being to make sure that the DOC and the DNR are adressing these issues in some coordinated fashion. Again if you look at the testimony of Nancy Kochis, she stated quite clearly that the DOC and the DNR are in contact with each other on almost a daily basis with regard to these matters. In fact she had previously worked for the DNR in this area so she was quite familiar with the proceedures and requirements of both the DOC and the DNR. As the entire purpose of this meeing was to guarantee interdepartmental coordination in these matters, which indeed was and did occur, there is no showing of any determent to the Petitioner because the meeting was not held. Again I'm satisfied this is a position and an arguement by the Petitioner that is without merit.

The remaining issue that the Petitioner raises is that he was a large volume user of petroleum products pursuant to Sec 101.143(4)(d)(2)(a) Wis Stats and ILHR 47.025(2)(b)(1). These would allow for up to $1,000,000 for reimbursement for clean up. A high volume user however, is defined as an individual that handles on an annual average more than 10,000 gallons of petroleum products per month. During certain times of the year the Petitioner was using well in excess of 10,000 gallons per month. However, the only year that the Petitioner had records for showed a total use of approximately 105,000 gallons. There are months during the year because of the nature of the Petitioners business, that there is very little activity because of the weather.

During other times of the year the Petitioner is using 15,000 gallons or more. Because the Petitioner argues that as it is a seasonal business and while in operation is using in excess of 10,000 gallons per month that therefore he should qualify, I'm satisfied it is without support. The rule for a large volume petroleum handler is for an annualized average of more than 10,000 gallons per month. Any reasonable interpretation is that over the course of a year that an average is more than 10,000 gallons per month, meaning in effect a total of 120,000 gallons or more per year. This certainly does take into account what may be seasonal differences or the seasonal opperations of some businesses. But I'm satisifed that the use of term annual average means exactly that, that the monthly average is to be annualized meaning the average per month over the course of a year. Clearly the facts in this circumstance shows that was just simply not the case and therefore the Petitioner would not be entitled to additional reimbusement pursuant to this section.

CONCLUSION

Based upon the foregoing, I'm satisfied the DOC interpretation was appropriate I'm also satisifed that there was more than substantial evidence available to the Administrative Law Judge to make the findings that there was only one occurrence eligible for PECFA reimbursement. On that basis the decision of the Admisinstraive Law Judge is sustained.

IT IS ORDERED that the Petition for Certiorari as brought by the Petitioner is denied.

Dated this 22nd day of November, 2002.

LEE S DREYFUS, JR.
CIRCUIT COURT JUDGE
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